IN THE

MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
	)	
vs.	)	**No. SC83745**
	)	
	)	
KENNETH BAUMRUK,	)	
	)	
Appellant.	)	

Appeal to the MISSOURI SUPREME COURT

From the Circuit Court of ST. LOUIS COUNTY

Twenty-First Judicial Circuit, The Honorable Mark D. Seigel, JUDGE

APPELLANT'S REPLY BRIEF

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Jurisdiction

Ken incorporates the Jurisdiction statement appearing at page 12 of his Opening Brief.

Facts

Ken incorporates the Facts that appear on pages 13-28 of his Opening Brief.

Points[2]

I.

The trial court erred in trying Ken's case at *the murder scene* because such ruling denied Ken due process, a fair, impartial, indifferent jury and subjected him to cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV;Mo.Const.,Art.I, §§10, 18(a),21,22(a). St.Louis County employed a procedure 'inherently lacking in due process" and created far too great a risk that "prejudice, passion, excitement, and tyrannical power" would decide Ken's fate rather than the "calmness and solemnity" constitutionally required. This Court must independently review this extraordinarily rare spectacle.

Turner v. Louisiana, 379 U.S. 466(1965);

U.S.Const.,Amends.V,VI,VIII,XIV; and

Mo.Const.,Art.I,§§10,18(a),21,22(a).

[2] Ken maintains each of the Points Relied On contained in his Opening Brief.

II.[3]

The trial court abused its discretion in refusing to change venue because such ruling denied Ken due process, a fair, impartial, indifferent jury and subjected him to cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV;Mo.Const., Art.I,§§10,18(a),21. Though time had passed since the mayhem of Ken's "Vietnam-like" attack, passions had not cooled among St.Louis Countians. Ken's acts forever linked him to the need for metal detectors at the Courthouse, and Juror Belding admitted that, being "human," there was a danger that his decision would be influenced by the publicity he had heard. The State insured prejudice by repeatedly imploring jurors to protect "this courthouse, your courthouse."

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21; and

Rules 4-3.3 and 55.03.

[3] Presented alternatively to Point I.

III.

The trial court erred in refusing to disqualify all judges in the 21st Judicial Circuit because such ruling violated Ken's rights to due process, a fair trial before a fair/impartial arbiter and freedom from cruel/unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. Feeling vulnerable, the Circuit "proposed a security plan designed to ensure judicial personnel, court employees and citizens…an environment…free of illegally carried dangerous and deadly weapons…." A dispute with the County delayed implementation of a security plan, prompting jokes "that nothing would be done until somebody gets killed." On May 5, 1992, during another meeting about security, the Circuit's Courthouse suffered an attack "likened to a firefight in Vietnam." Refusing to disqualify the Circuit destroyed the "appearance of justice."

Bracy v. Gramley, 520 U.S. 899(1997);

In re Murchison, 349 U.S. 133(1955);

Tumey v. Ohio, 273 U.S. 510(1927);

U.S.Const.,Amends.V,VI,VIII,XIV; and

Mo.Const.,Art.I,§§10,18(a),21.

IV.[4]

The trial court abused its discretion in refusing to disqualify Judge Seigel because such ruling violated Ken's rights to due process, a fair trial before a fair/impartial arbiter and freedom from cruel/unusual punishment. U.S. Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. A reasonable person would see an appearance of impropriety and doubt Judge Seigel's impartiality. The clearest illustration of Judge Seigel's bias comes from *Nicolay v. Baumruk.* Although he appointed a GAL to protect Ken's rights, Judge Seigel let the GAL shift the burden of defending the case to Ken – his incompetent ward, thereby perpetrating a fraud on the court.

Cooper Industries, Inc. v.Leatherman Tool Group, Inc., 532 U.S. 424(2001);

State v. Black, 50 S.W.3d 778(Mo.banc2001);

State v. Lovelady, 691 S.W.2d 364(Mo.App.,W.D.1985);

State ex rel. Wesolich v. Goeke, 794 S.W.2d 692(Mo.App.,E.D.1990);

U.S. Const.,Amends.V,VI,VIII,XIV; and

Mo.Const.,Art.I,§§10,18(a),21.

[4] Presented alternatively to Point III.

V.

The trial court erred in entering judgment/sentence against Ken because it lacked subject matter jurisdiction and entering judgment/sentence violated Ken's rights to due process, freedom from cruel/unusual punishment, and freedom from bills of attainder. U.S.Const., Art.I,§10,Amends.V,VIII,XIV; Mo.Const.,Art.I, §§10,21. Judge Belt's finding that Ken is permanently incompetent and his dismissal of the 18-count indictment constituted final judgments under §552.020, RSMo1994. Subject matter jurisdiction over the validity of Judge Belt's rulings rested in direct appellate review not in collateral proceedings. By foregoing its appellate remedy, St.Louis County stripped the trial court in this case of subject matter jurisdiction.

State v. Moore, 952 S.W.2d 812(Mo.App.E.D.1997);

State v. Honeycutt, No. WD60010(Mo.App.W.D.4/16/2002);

Casey v. Department of Social Services, 727 S.W.2d 462(Mo.App.E.D.1987);

Bartlett & Company Grain v. Department of Revenue, 649 S.W.2d 220 (Mo.banc1983);

U.S.Const.,Art.I,§10,Amends.V,VIII,XIV;

Mo.Const.,Art.I,§§10,21;

§§547.200,552.020,RSMo1994;

§§547.200,552.020,RSMoCum.Supp.1997.

VI.

The trial court abused its discretion in precluding Ken from asking jurors whether they would be predisposed to vote for the death penalty since Ken not only shot and killed his wife but "he also shot others" because such ruling violated Ken's rights to due process, a fair trial, effective counsel, effective/reliable sentencing and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§2,10,18(a),19,21. Like the killing of young, innocent children, the attempted killing of innocent bystanders in their Courthouse carries a "substantial potential for disqualifying bias." That Ken "had a gun *here* and shot some people" greatly disturbed the community. It became clear while questioning Juror Schultz that this critical fact had to be disclosed.

State v. Clark, 981 S.W.2d 143(Mo.banc1998);

State v. Oates, 12 S.W.3d 307(Mo.banc2000);

Schneider v. Delo, 85 F.3d 335(8th Cir. 1996);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§2,10,18(a),19,21.

VII.

The trial court erred in finding Ken competent to proceed, in making him stand trial and in sentencing him because such rulings violated Ken's rights to due process, freedom from cruel/unusual punishment and not to be tried while incompetent. U.S.Const.,Amends.V,VIII,XIV; Mo.Const.,Art.I,§§10,21;§552.020, RSMo1994. The State wants to presume Ken to be competent in this case and place the burden on Ken to prove that he is incompetent. Such a presumption, after all, lets the State skirt critical facts: 1) on March 30, 1998, Ken *was incompetent* and there was no substantial probability that he would become competent in the foreseeable future; and 2) in finding Ken to be competent for trial, Judge Seigel ignored the copious evidence rebutting Dr. Rabun's *belief* that Ken is malingering.

U.S.Const.,Amends.V,VIII,XIV;

Mo.Const.,Art.I,§§10,21;

§552.020,RSMo1994.

VIII.

The trial court abused its discretion in refusing to strike Juror Belding for cause thereby depriving Ken of due process, a fair trial before a fair, "impartial, indifferent" jury, and subjecting him to cruel/unusual punishment. U.S.Const., Amends.V,VI,VIII, XIV; Mo.Const.,Art.I,§§10,18(a),21. Belding could not unequivocally assure the court that his verdict would not be influenced by the news accounts he had heard. He could say only, "I think so," all the while agreeing that, being human, there was a danger that he would be so influenced. The publicity portrayed the shootings as a cold, calculated, "Vietnam-like attack," implying clear deliberation. Since Ken's only defense was that he acted out of rage, the danger of Belding's verdict being influenced by the publicity created a real probability of prejudice.

State v. Griffin, 756 S.W.2d 475(Mo.banc1988);

U.S.Const.,Amends.V,VI,VIII,XIV;

Mo.Const.,Art.I,§§10,18(a),21.

Argument

I. *Venue Created Inherent Prejudice*

The trial court erred in trying Ken's case at *the murder scene* because such ruling denied Ken due process, a fair, impartial, indifferent jury and subjected him to cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10, 18(a),21,22(a). St.Louis County employed a procedure 'inherently lacking in due process" and created far too great a risk that "prejudice, passion, excitement, and tyrannical power" would decide Ken's fate rather than the "calmness and solemnity" constitutionally required. This Court must independently review this extraordinarily rare spectacle.

The State tries to deflect this Court's attention away from the spectacle of its having tried Ken *at the murder scene.* To read respondent's combined ***Argument I and II,*** leaves the misimpression that both points hinge upon the wave of publicity. But Ken's argument in ***Point I*** has nothing to do with publicity and everything to do with the inherently unfair procedure employed by the State. The focus of ***Point I*** is the circus-like atmosphere of the trial.

By mixing this apple with the bag of oranges in ***Point II***, the State creates the illusion that both are addressed to the trial court's discretion. They are not. As fully discussed in Ken's opening brief, the use of inherently prejudicial procedures must be reviewed *de novo* (App.Br.52).

Respondent's refusal to discuss *Turner v. Louisiana*, 379 U.S. 466(1965) sticks out like a sore thumb (Resp.Br.10,20-27). Ken relied heavily on *Turner* in his opening brief (App.Br.52-54). Like the procedure here, the procedure in *Turner* had nothing to do with publicity. *Turner* involved the "continual association throughout the trial between the jurors and … two key witnesses for the prosecution." *Id.* at473. The mere potential for prejudice stemming from that procedure made Turner's trial "little more than a hollow formality." *Id*. The same is true of the continual association here between Ken's jurors and *the murder scene*. Were the seated in the same courtroom? No. But to get to the courtroom, they had to use the same entrance, elevators, escalators and stairs that the victims had used to escape the mayhem. This Court must reverse and remand for a new trial in a different venue.

II. [5] *Venue Caused Actual Prejudice*

The trial court abused its discretion in refusing to change venue because such ruling denied Ken due process, a fair, impartial, indifferent jury and subjected him to cruel and unusual punishment. U.S.Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I, §§10,18(a),21. Though time had passed since the mayhem of Ken's "Vietnam-like" attack, passions had not cooled among St.Louis Countians. Ken's acts forever linked him to the need for metal detectors at the Courthouse, and Juror Belding admitted that, being "human," there was a danger that his decision would be influenced by the publicity he had heard. The State insured prejudice by repeatedly imploring jurors to protect "this courthouse, your courthouse."

Before trial, the State implicitly agreed that if St.Louis Countians "associated [Ken] with this incident or increased security at the St.Louis County Courthouse," venue should be moved (L.F.80-81). He most certainly is associated with the "increased security" (Tr.24,47,57,1082,1206,1208,1275,1288,1319,1330,1366,1441,1493,2003). Indeed, the State emphasized that the metal detectors were needed only after Ken's attack: "We didn't have metal detectors here in 1992." (Tr. 2003).

Having seen that Ken ***is*** associated with the "increased security," the State wants to hide from its position before trial. Instead of addressing this association, respondent diverts attention with a specious argument that Juror Johnson's "recollection was apparently of a different incident." (Resp.Br.21,n.3). Respondent cannot have a good

[5] Presented alternatively to Point I.

faith basis for such a reckless assertion. ***The incident*** about which Juror Johnson heard involved "[s]omething about some man got up in court, started shooting, shot his wife and some other people." (Tr.1069). The State followed-up:

> MR. WALDEMER: Do you remember when this was that you heard this information?
>
> [JUROR] JOHNSON: I thought it happened last year.
>
> MR. WALDEMER: Last year?
>
> [JUROR] JOHNSON: Yes.
>
> MR. WALDEMER: I just indicated to you that it happened in 1992?
>
> [JUROR] JOHNSON: Oh, maybe that was a different case then.
>
> MR. WALDEMER: It may have been a different case?
>
> [JUROR] JOHNSON: Yes.

(Tr.1069).

For Juror Johnson to be recalling a "different incident," requires there to have been another incident of mayhem inside the St.Louis County Courthouse in 2000. But saying it does not make it so. Who is that defendant? Undersigned counsel has canvassed St.Louis area Public Defenders and the simple fact is that, to date, there has been but ***one*** incident where a man "shot his wife and some other people" in St.Louis County's Courthouse. Ken is that man. The State should not be able to make such careless claims. Rules 4-3.3 and 55.03(b)(3).

If this case did not require a change of venue, then no case ever will. This Court must reverse and remand for a new trial in a new venue.

III. *TwentyFirst Circuit Could Not Be Fair*

The trial court erred in refusing to disqualify all judges in the 21st Judicial Circuit because such ruling violated Ken's rights to due process, a fair trial before a fair/impartial arbiter and freedom from cruel/unusual punishment. U.S.Const., Amends.V,VI,VIII, XIV;Mo.Const.,Art.I,§§10,18(a),21. No judge in the 21st Circuit could "hold the balance nice, clear and true between the State and [Ken]" – after all, Ken had launched his attack in the Circuit's back hallways, even pursuing victims into judicial chambers. The Circuit had joked for years that someone would have to be killed before the County would heed its request to enhance security. Whether the 21st Circuit could preside over Ken's trial has nothing to do with the Code of Judicial Conduct – this is one of the extraordinary cases that falls below the constitutional floor.

Lacking any constitutional footing for its argument that the 21st Circuit could preside over Ken's case, respondent ignores the constitutional analysis altogether. Respondent's one paragraph argument for affirmance rises and falls with an application of the Code of Judicial Conduct (Resp.Br.28). But as Ken made clear in his opening brief, ***his*** argument for reversal lies with the Constitution, not the Code (App.Br.63-67). This claim is resolved by *Bracy v. Gramley*, 520 U.S. 899 (1997), *In re Murchison*, 349 U.S. 133 (1955), and *Tumey v. Ohio*, 273 U.S. 510 (1927).

> Every procedure which offers a *possible temptation* to the *average man as a judge* to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Tumey,273 U.S. at532(added). Letting the 21st Circuit preside over Ken's case after enduring the tragedy of Ken's attack constitutes one of those extraordinarily rare procedures prohibited by due process. Fair trials, and the appearance of justice are too important to let a Circuit serve as the tribunal for a murder committed therein. This Court must reverse and remand for retrial outside the 21st Circuit.

IV.[6] *Judge Seigel Prejudged Ken*

The trial court abused its discretion in refusing to disqualify Judge Seigel because that ruling violated Ken's rights to due process, a fair trial before a fair/impartial arbiter and freedom from cruel/unusual punishment. U.S. Const., Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§10,18(a),21. A reasonable person would see an appearance of impropriety and doubt Judge Seigel's impartiality. The clearest illustration of Judge Seigel's bias appears in *Nicolay v. Baumruk,* where he let the GAL shift the burden of defending the case to his incompetent ward and, in imposing punitives, he found that Ken's actions were "so outrageous, extremely intentional…reflect[ing] reckless disregard to the rights of others…"

Despite a clear record to the contrary, the State concludes, "[T]here is no evidence that Judge Seigel's rulings in *Nicolay* gave him a bias that was so extreme as to cause him to be unable to render a fair judgment." (Resp.Br.37). To draw this conclusion, respondent necessarily avoids any mention of the fraud that Judge Seigel let the GAL commit. Judge Seigel appointed Martin Barnholtz as Ken's GAL because Ken was incompetent to proceed alone (SuppL.F.474). This obliged Barnholtz to step into Ken's shoes and defend Nicolay's lawsuit. Tragically, for Ken, Barnholtz never even talked to him (L.F.473-475). Indeed, the State conceded this below (L.F.218).

Barnholtz told Judge Seigel that he had called "Fulton Hospital" to talk to Ken, but "I was notified he was unable to talk to me and they referred me to his caseworker…"

[6] Presented alternatively to Point III.

(L.F.473). Barnholtz spoke with Ken's caseworker for about forty-five minutes, learning that "Mr. Baumruk was incompetent and basically would not be able to discuss the matter with me or help me concerning this matter." (L.F.474). Learning this is what prompted Barnholtz to send the letters discussed in Ken's opening brief (App.Br.73,*citing*Supp.L.F. 482,483). As fully discussed in Ken's opening brief, Barnholtz simply shifted the burden of retaining counsel and preparing a defense to his incompetent ward (App.Br.73). And, despite being fully informed of these facts, Judge Seigel did nothing. Giving his imprimatur to this fraud is clear evidence that he suffered from such an extreme bias against Ken that he could not render a fair and impartial judgment.

Respondent gives much credit where credit is not due, stating, "At the hearing before Judge Seigel on November 1, 1996, appellant was represented by attorney John Doyen and attorney Martin Barnholtze [sic], who was his defendant ad litem (Resp.Br.35, *citing* Relator's Exhibit-D at 2).[7] As already discussed, Barnholtz did not represent Ken. Neither did Doyen. Doyen was retained by Ken's insurer – State Farm (L.F.477). After State Farm obtained a declaratory judgment that "there was no insurance coverage" for Ken's actions on May 5, 1992, Doyen moved to withdraw from *Nicolay v. Baumruk*, noting his conflict of interest (L.F.477-478). Doyen can hardly be described as Ken's zealous advocate.

[7] In footnote 7 of its brief, the State asks this Court to judicially notice "*State ex rel. Baumruk*, No. SC82281." Ken has no objection, but notes that "Relator's Exhibit D" appears in this record (L.F.456-477).

At that November 1, 1996, hearing, neither Doyen, nor Barnholtz offered ***any*** argument on Ken's behalf, and Judge Seigel invited none. Judge Seigel simply heard from Mr. Nicolay and entered his judgment, including $25,000 punitive damages. How he arrived at this figure cannot be discerned as Nicolay's petition simply requests "such sum as is fair and reasonable for punitive damages" (SuppL.F.393). The State dismisses Judge Seigel's punitive damages award as irrelevant because they required a different fact-finding than did the statutory aggravators (Resp.Br.36). That misses the point. Punitive damages are intended to punish the worst, most-reprehensible civil defendants. They are of such a unique character as to require *de novo* review on appeal. *Cooper Industries, Inc. v.Leatherman Tool Group, Inc*., 532 U.S. 424,436 (2001); *Cf. State v. Black*, 50 S.W.3d 778,793-799(Mo.banc2001)(J.Wolff,dissenting). That Judge Seigel found that Ken was sufficiently reprehensible to justify punitive damages would cause a reasonable person to question his impartiality.

The State claims that Judge Seigel's rulings here were "fair and impartial." (Resp.Br.37). Ken strongly disagrees with that assessment – there are 17 objective bases for this Court to reverse Judge Seigel. But more importantly, Judge Seigel's actions give rise to the reasonable perception that he was biased. *See State v. Lovelady*, 691 S.W.2d 364,365(Mo.App.,W.D.1985). Our system cannot function without the public's confidence that litigants cannot be compelled to submit their case to a court they sincerely believe to be biased. *State ex rel. Wesolich v. Goeke*, 794 S.W.2d 692,694 (Mo.App.,E.D.1990).

A reasonable person would lack confidence in Judge Seigel's impartiality. This Court must reverse Ken's conviction and remand for a new trial before a fair/impartial judge.

V. *No Jurisdiction Over Refiled Indictment*

The trial court erred in entering judgment/sentence against Ken because it lacked subject matter jurisdiction and entering judgment/sentence violated Ken's rights to due process, freedom from cruel/unusual punishment, and freedom from bills of attainder. U.S.Const., Art.I,§10,Amends.V, VIII,XIV; Mo.Const.,Art.I,§§10,21. Judge Belt's finding that Ken is permanently incompetent[8] and his dismissal of the 18-count indictment constituted final judgments under § 552.020,RSMo1994. Subject matter jurisdiction over the validity of Judge Belt's rulings rested in direct appellate review not in collateral proceedings. By foregoing its appellate remedy, St.Louis County stripped the trial court in this case of subject matter jurisdiction.

This Court ordered Judge Belt to dismiss the 18-count indictment against Ken Baumruk. *State ex rel. Baumruk v. Belt*, 964 S.W.2d 443,446-447 (Mo.banc1998). And Judge Belt complied.

What was the effect of Judge Belt's dismissal? The answer lies in §552.020.10(6), RSMo1994. The State claims that the statutory language is clear and that it would be improper to apply rules of construction (Resp.Br.43). Ironically, the State concedes that

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[8] Respondents accuses appellant of "wish[ing]" that §552.020.10(6),RSMo1994 resulted in a finding that he was "permanently incompetent." (Resp.Br.44,*citing* App.Br. 12). Respondent misreads page 12 of appellant's brief. There, appellant noted that "For space," he was using "permanently incompetent" rather than quoting the statute. (App.Br.12,n.2). Appellant made 16 such references, saving 240 words.

"it would be up to other courts to later determine the legal effect of [Judge Belt's] order…." *Id.* If the statute were clear, the legal effect would be as well. But, of course, the statute is not clear. As fully discussed in Ken's opening brief, the 1994 statute is absolutely silent on this question (App.Br.77-78). The only way to determine the statute's meaning is to apply rules of construction. *Bartlett & Company Grain v. Department of Revenue*, 649 S.W.2d 220,223 (Mo.banc1983). In 1997, the Legislature amended to make future dismissals "without prejudice" (App.Br.77-78). It would have been useless to add these words *if* dismissals were already intended to be "without prejudice."

This reality is made abundantly clear by *State v. Moore*, 952 S.W.2d 812 (Mo.App.E.D.1997) and *State v. Honeycutt*, No. WD60010 (Mo.App.W.D.4/16/2002). In *Moore*,*supra* at814, the State appealed the trial court's dismissal pursuant to §552.020.10(6),RSMo1994. Had that dismissal been *without prejudice*, it would not have been a final judgment and the Eastern District would have dismissed the appeal. *See Honeycutt*,*supra* slip op.5. Indeed, this is why the Legislature amended §547.200, RSMo1994 at the same time it amended §552.020.10(6). *See* §547.200.1(2), RSMoCum. Supp.1997;(AppendixA24-A26) Had it not amended §547.200 to vest the State with the right to appeal a 552 dismissal, there would no longer have been a right to appeal such dismissals. This amendment to §547.200 was not necessary to give the State the right to appeal in *Moore* because 552 dismissals under the 1994 statute were **with prejudice**.

As fully discussed in Ken's opening brief, on March 30, 1998, St.Louis County's remedy was to appeal Judge Belt's dismissal (App.Br.78-79). The State claims that

"whether the State has the opportunity to appeal a ruling is irrelevant to its ability to refile charges after dismissal." (Resp.Br.43, *citing State v. Beezley*, 752 S.W.2d 915,917(Mo.App.S.D.1988). This is not a fair reading of *Beezley*. In *Beezley*,*supra,* the defense orally moved to suppress evidence at the preliminary hearing, and the judge granted the motion. The State then ***voluntarily*** dismissed that case and refiled the charge in another case. Here, St.Louis County fought to avoid the dismissal of its 18-count indictment.

Beezley considered whether the prior order suppressing the evidence bound the new case. It did not.

> A judgment in one action cannot be carried over to a second action and given conclusive effect in the second action,…if the judgment was considered *merely tentative* in the very action in which it was rendered. (citation omitted). The fact that the order suppressing evidence is appealable is *not determinative*.

Beezley,752 S.W.2d at917(added). A motion to suppress is an interlocutory ruling, thus the prior order suppressing the evidence was merely tentative. The same cannot be said of Judge Belt's finding that Ken is permanently incompetent, a finding that became final and conclusive upon Judge Belt's order dismissing the 18-count indictment.

Faced with this dismissal, St.Louis County had two choices – close its file or file an appeal. If dissatisfied with the dismissal, the prosecutors should have walked out of Judge Belt's courtroom and into the Macon County Circuit Clerk's office to file a Notice of Appeal. Instead, they pretended Judge Belt's rulings didn't exist, and simply refiled their 18-count indictment in St.Louis County. The State tries to remove this monkey

from St.Louis County's back and put it on Ken's by saying this is a question of personal jurisdiction that was waived. It cannot.

This is not a question of what court has jurisdiction over Kenneth Baumruk. It is a question of what court had jurisdiction to review Judge Belt's dismissal, as respondent concedes would have to be done by some later court. The situation here is analogous to *Casey v. Department of Social Services*, 727 S.W.2d 462 (Mo.App.E.D.1987).

In *Casey*, DSS notified Casey by letter that his Medicaid vendor status was being terminated and he had 30 days in which to file an appeal to the Administrative Hearing Commission. *Id.* at463. Casey did not do so, but 3 days after the time to appeal had lapsed, Casey filed a complaint with the Commission. *Id.* Within three weeks, DSS filed a responsive pleading, followed 2½ months, later by a motion to dismiss for lack of jurisdiction. *Id*. The Commission sustained the latter motion and dismissed the complaint. *Id.*

Casey appealed the dismissal, arguing that DSS had waived any objection to jurisdiction by appearing and filing the responsive pleading. *Id.* The Eastern District began by asking whether Casey's failure to file the appeal within thirty days stripped the Commission of personal or subject matter jurisdiction. *Id.* The power to review a decision is a question of subject matter jurisdiction. *Id.* It held that, although the Commission had subject matter jurisdiction generally to review such terminations, it did not have subject matter jurisdiction to review *this* termination because Casey failed to appeal it. *Id.*

As in *Casey*, the dispositive question is whether failure to file an appeal deprives subsequent courts of personal or subject matter jurisdiction. Here, respondent tries to turn this into a question of personal jurisdiction (Resp.Br.42-43). It's not. The authority to review a judicial decision is a question of subject matter jurisdiction. *Casey*, *supra*. So, the question becomes what court had subject matter jurisdiction to review Judge Belt's order dismissing the 18-count indictment? Certainly not the St.Louis County Circuit Court where *this* case originated. Only this Court has authority to review cases involving the death penalty, but the time to have invoked that authority has long since lapsed. There is no subject matter jurisdiction over this 18-count indictment.

St.Louis County thumbed its nose at Judge Belt and this Court. Bypassing the only avenue of direct review of Judge Belt's order, St.Louis County prosecutors drove home and immediately refiled the 18-count indictment that Judge Belt had just dismissed. This procedure is so contrary to the rule of law that it defies description.

This is not a situation of the State trying to reinstitute charges in the "unforeseeable future if circumstances changed," as respondent suggests (Resp.Br.44; *accord*Resp. Br.43). On March 30, 1998, Judge Belt dismissed the 18-count indictment because there was "no substantial probability that [Ken would] be mentally fit to proceed in the *reasonably foreseeable future*." (L.F.171-173;App.Br. AppendixA13-A15) (added). Within scant hours, St.Louis County prosecutors drove home and refiled that indictment in a new case. But St.Louis County refiled the 18-count indictment before the close of business that same day – March 30, 1998. Surely the State cannot believe that Judge Belt could not foresee even a few hours into the future. That is the crux of the

problem because the refiled indictment subjected an incompetent man to continued criminal detention. Since a jury had already determined that Ken didn't need a guardian, he had to be released. *Jackson v. Indiana*, 406 U.S. 715,737(1972). Indeed, the statute contemplated he would be discharged. §552.020.10(6),RSMo1994.

Bypassing their appellate remedy, St.Louis County divested any court of subject matter jurisdiction. This case is a nullity and the rule of law requires this Court to order the 18-count indictment be dismissed and Ken be discharged from it permanently.

VI. *Improperly Limited Voir Dire*

The trial court abused its discretion in precluding Ken from asking jurors whether they would be predisposed to vote for the death penalty since Ken not only shot and killed his wife but "he also shot others" because such ruling violated Ken's rights to due process, a fair trial, effective counsel, effective/reliable sentencing and freedom from cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII,XIV; Mo.Const.,Art.I,§§2, 10,18(a),19,21. Like the killing of young, innocent children, the attempted killing of innocent bystanders in their Courthouse carries a "substantial potential for disqualifying bias." That Ken "had a gun *here* and shot some people" greatly disturbed the community. It became clear while questioning Juror Schultz that this critical fact had to be disclosed.

Contrary to respondent's protestations, the fact that counsel decided before voir dire that prospective jurors should only hear that Ken was charged with shooting his wife does not constitute a waiver of this error (Resp.Br.45). Assuming *arguendo* that counsel's decision had been reasonable – a question for another court on another day to answer – can he not adapt his decision as the trial unfolds and situations arise? Trying to avoid appellate review of this substantial error, the State simply overlooks how it was that counsel decided that he must question the jurors about this critical fact.

"[D]epend[ing] on the circumstances," Juror Schultz believed that death was the appropriate sentence (Tr.1221). He recalled no details of the incident, but did recall that Ken had killed his wife while going through a divorce (Tr.1223). Based on this, Schultz was not predisposed to impose death (Tr.1224). Based on these answers, defense counsel

realized that he needed to disclose more. *Id.* Counsel needed to elicit whether the fact that Ken also shot others in the Courthouse would give Schultz a disqualifying bias. *Id.* The court precluded counsel from conducting this voir dire based *solely* on the erroneous conclusion that this was not a "critical fact" (Tr.1225-1226,1251-1256). This error is preserved for appellate review – any other conclusion would transform the rules of preservation into a game of "legal gotcha." *Schneider v. Delo*, 85 F.3d 335,339(8thCir. 1996).

What is a "critical fact"? It cannot be that the *only* critical fact that exists is the killing of a child. *See State v. Clark*, 981 S.W.2d 143 (Mo.banc1998). So, what is it that makes the killing of a child a "critical fact"? In *State v. Oates*, 12 S.W.3d 307,311 (Mo. banc2000), this Court explained that a fact becomes critical when there is a "prevalent perception among society" that particular conduct is "never justified, regardless of any extenuating circumstances." The murder of a child is one such example. The attempted murder of innocent bystanders in the halls of a courthouse is another. The prosecutors understood and seized upon this prevalent perception:

> You are dealing with a man, when he came into this courthouse, a public building in St.Louis County, a building where citizens come to have their disputes settled in a law-abiding way, where citizens come for justice, whether it be a criminal or a civil case, and he came prepared for battle to kill as many as he could possibly kill. That is what we are talking about and for that crime the appropriate punishment is death.

(Tr.2235;App.Br.AppendixA101). As fully discussed in Ken's opening brief, the prosecutors hammered this theme with 11 nails throughout its guilt and penalty arguments (App.Br.107-108).

Ken suffered a "real probability of injury" that must be cured. Respondent criticizes appellant's opening brief for requesting a new trial, arguing that the error "only pertains [to] the penalty phase." (Resp.Br.51,n.11). Certainly, counsel made the request to disclose this critical fact during the death qualification. Undersigned counsel relied on the trial court's granting trial counsel a continuing objection (Tr.1256), and a mistaken belief that the motion for new trial requested a new trial as to this error. It does not (L.F. 1036). Undersigned counsel maintains that this error, like that in *Clark*, infected the entire trial. The disqualifying bias stemming from this critical fact infects both phases of trial, and this Court should grant a new trial.

VII. *Ken Could Not Assist In His Defense*

The trial court erred in finding Ken competent to proceed, in making him stand trial and in sentencing him because such rulings violated Ken's rights to due process, freedom from cruel/unusual punishment and not to be tried while incompetent. U.S. Const.,Amends.V,VIII,XIV; Mo.Const.,Art.I,§§10,21;§552.020, RSMo1994. The State wants to presume Ken to be competent in this case and place the burden on Ken to prove that he is incompetent. Such a presumption, after all, lets the State skirt critical facts: 1) on March 30, 1998, Ken *was incompetent* and there was no substantial probability that he would become competent in the foreseeable future; and 2) in finding Ken to be competent for trial, Judge Seigel ignored the copious evidence rebutting Dr. Rabun's *belief* that Ken is malingering.

According to respondent, appellant has a "fundamental misunderstanding of the law concerning competency" (Resp.Br.52). Well, admittedly, appellant has a fundamental misunderstanding in this case, but it has nothing to do with the "law concerning competency." Appellant well-understands that law and addressed it in his opening brief (App.Br.87-99). What appellant fundamentally misunderstands is just why it is that the State believes it need not play by the rules. This case well-demonstrates the lengths to which the State will go to win at any cost to justice.

Faced with a *finding of fact* that Ken is *incompetent* with *no substantial probability* of becoming competent in the *reasonably foreseeable future*, the State should have appealed. *See* PointV,*supra*. It didn't because the rules of appellate review made success extremely unlikely. On appeal, the State would have faced great deference to

Judge Belt's finding that Ken is *incompetent*. To avoid that rule, the State simply ignored Judge Belt's finding and refiled its indictment. Now, as the State gleefully notes, Ken is "presumed to be competent" and bears the burden of proving otherwise before a new tribunal (Resp.Br.57-58). How convenient! This is precisely why the State's refiling its indictment so offends the rule of law.

But, the State is not satisfied even with this advantage; it must invite this Court to give blind deference to the trial court. Dr. Rabun's *belief* that Ken is malingering stems from the assessment of a few lay witnesses that Ken recalled the shootings (Tr.448-449,588,601). Dr. Rabun did nothing to evaluate the validity of these lay opinions; he blindly accepted them, insisting it was not his responsibility to determine whether these lay opinions were credible (Tr.550-551,587). Apparently, the State does not believe that anyone has that responsibility.

Appellant's brief details copious facts that had been presented to Ken before any of his alleged statements about the shootings (App.Br.92-93, 96-97). Although Dr. Rabun agreed that Ken can read, learn, recall and restate information (L.F.318-319;Tr.278), neither he nor Judge Seigel considered whether Ken's statements stemmed from such learned knowledge. Now, the State tries to avoid this Court's consideration of that by arguing that appellant is asking this Court to "reweigh the evidence that was presented and make new credibility determinations." (Resp.Br.58). This Court cannot reweigh the evidence, but it must consider all the evidence when deciding the propriety of the trial court's ruling. After that review, this Court must reverse Ken's conviction and order him discharged.

VIII. *Juror Belding Could Not Be Fair*

The trial court abused its discretion in refusing to strike Juror Belding for cause thereby depriving Ken of due process, a fair trial before a fair, "impartial, indifferent" jury, and subjecting him to cruel/unusual punishment. U.S.Const.,Amends.V,VI,VIII, XIV; Mo.Const.,Art.I,§§10,18(a),21. Belding could not unequivocally assure the court that his verdict would not be influenced by the news accounts he had heard. He could say only, "I think so," all the while agreeing that, being human, there was a danger that he would be so influenced. The publicity portrayed the shootings as a cold, calculated, Vietnam-like attack, implying clear deliberation. Since Ken's only defense was that he acted out of rage, the danger of Belding's verdict being influenced by the publicity created a real probability of prejudice.

The State contends that Belding "repeatedly and unequivocally stated that he could decide the case solely on the evidence that was adduced." (Resp.Br.59). This simply does not comport with the record. The only thing Belding said repeatedly was, "I think so." In *State v. Griffin*, 756 S.W.2d 475,480-481 (Mo.banc1988), this Court found similar statements to express an unequivocal fairness. But, Belding's "I think so" is not at all like those of Jurors Kloud and Brewer in *Griffin*:

- Kloud first said she would like to hear from Griffin, but then said "No, no, I'm not saying [I could not presume him innocent if he doesn't testify]." *Id.* at480. Finally, she said, "I think so" that she could presume Griffin innocent even if he did not testify or offer other evidence. *Id.* "Her response 'I think so' was not equivocal in this context." *Id.* at481.

- Brewer personally believed that a defendant who did not testify was "more apt to be guilty … That's just my opinion." *Id*. at480. He "unambiguously" explained twice that "yes" he could set aside his "personal opinion" and "follow the law." *Id.* at480-481.

Belding "unambiguously" explained the "danger" that the publicity would "influence" his verdict. While the trial court tried to get Belding's unequivocal assurance that he would set aside his opinion and follow the law, Belding could never give it. "I'll say yes" does not erase Belding's other responses, the context of which illustrates that Belding could not make such an assurance before he heard what facts would be presented in court.

The State concludes that even if Belding was biased no prejudice could have resulted because the fact that Ken shot his wife was not disputed (Resp.Br.65). This paints the problem with too broad a brush. As fully discussed in PointII of Ken's opening brief, the publicity to which Belding was exposed did not merely report that Ken shot Mary (App.Br.55-60). It portrayed the shootings as something akin to "a firefight in Vietnam" (VenueEx.§§A-1,A-4), thus, implying clear planned-attack. Ken's only defense was that he did not deliberate, but rather acted out of rage (Tr.2009-2017; App.Br.AppendixA63-A71). The danger that Belding's decision on this issue would be influenced by the publicity he had heard created a real probability of prejudice. This Court must reverse Ken's conviction and sentence and remand for a new trial.

Proportionality

In its Point XVIII, respondent makes what must be a tongue-in-cheek assertion that "Appellant has chosen not to contest that this Court should affirm his sentence after conducting its mandatory [proportionality review]." (Resp.Br.106). *Appellant* certainly didn't make that choice, and neither did undersigned counsel. Undersigned counsel identified 16 errors that warranted relief. The initial draft of those 16 ***Points*** and ***Arguments*** tallied approximately 33,500 words. Even after cutting nearly 2,000 words through copious edits, counsel simply didn't have sufficient space to comply with this Court's briefing rule and to address proportionality. Respondent can omit Points Relied On. In contrast, appellant must not only have Points Relied On with the principle authorities listed, but he must also repeat each Point in the Argument section. This yielded an additional 4,664 words in appellant's brief. If counsel could have used subheadings in the Argument section rather than having to repeat the Points Relied On, he most certainly would have addressed proportionality. Since this Court must engage in a proportionality review whether appellant briefs it or not, the exclusion of that issue was no choice; it was a simple matter of mathematics and an effort to comply with this Court's briefing rule.

Raising proportionality requires a great many words. It is not as simple as the 2½ pages devoted to it by the State would suggest. Simply analyzing the proper standard of review could take 2½ pages of text. After all, there is serious debate whether this Court must review death sentences *de novo*. *State v. Black*, 50 S.W.3d 778,795 (Mo.banc2001)

(Wolff,J.,dissenting). Whether a punitive damage award is proportionate receives *de novo* review. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). Like punitive damages, death sentences carry a sense of "moral condemnation" -- they are "different" and are "to be used sparingly in only the most extreme cases." *Black,supra* (quotation omitted).

De novo review would seem to be what is mandated by §565.035. But, as Judge Wolff has observed,

> This Court has eschewed the statutory invitation to treat like cases alike by refusing to consider similar cases…where lesser sentences are given to other defendants. (citation omitted). Instead, most of our proportionality review consists of finding some similar cases where the death penalty has been imposed—a task that can rather conveniently be done by computer now that there have been 150 or so cases in which the death penalty has been imposed in recent years.

Black, 50 S.W.3d at794-795(Wolff,J,dissenting). Reviewing simply to find a case or cases where death has been imposed based on similar aggravating circumstances misses the point of proportionality review. "Without knowledge of the life-sentenced cases, [a court] would be unable to determine whether there is a 'meaningful basis' for distinguishing the death sentences it reviews from the 'many cases' in which lesser sentences are imposed." *In re Proportionality Review Project*, 735 A.2d 528,536 (NJ1999)(citation omitted). The legislature has created a reasonable expectation that this Court will review Ken's sentence by comparing it to all first-degree murder cases. *See Hicks v. Oklahoma*, 447 U.S. 343 (1980).

Executing Ken would offend justice. The State won this death sentence by ignoring the rule of law. To this day, Judge Belt's finding that Ken will not regain competence for the foreseeable future remains a valid one. The State simply chose to ignore it and seek a more favorable finding from a parallel court. On March 30, 1998, Judge Belt dismissed the 18-count indictment against Ken because he could not assist counsel nor would he be able to do so for the reasonably foreseeable future. He was presumptively incompetent, but the State refiled its indictment anyway. Even if this Court should decide that this do not rise to the level of reversible error, it is a factor that the Court must consider in evaluating the reliability and proportionality of this death sentence. U.S.Const.,Amends.VIII,XIV; §565.035.3(3); *Cooper Industries,surpa*. To let the State ignore that finding, refile its indictment, regain the presumption that Ken is competent all simply to win his execution would be a freakish application of the death penalty.

Under §565.035.3(1), this Court must determine whether Ken's death sentence was influenced by passion, prejudice, or any other arbitrary factor. Here, the State tried Ken *at the murder scene*. His jurors were in constant, intimate association with the scene of the crime. They passed through the metal detectors erected in response to Ken, they walked up the steps and escalators that the victims used to flee from Ken's rampage. The prosecutors then repeatedly implored the jurors to give death to regain their courthouse.

This Court must not give its imprimatur to this. It must vacate Ken's death sentence and impose a sentence of life imprisonment without the possibility of probation or parole.

Conclusion

This trial did not produce a fair ascertainment of the truth, thus Kenneth Baumruk respectfully requests the following relief:

Discharge:	PointV,VII
New Trial:	PointsI,II,III,IV,VI,VIII,IX,XI,XIII,XIV,XV
New Penalty-Phase:	PointsIX,X,XII,XVI,XVII
LWOP:	Proportionality

Respectfully Submitted,

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Certificate of Compliance and Service

I, Gary E. Brotherton, hereby certify as follows:

- ✓ The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office2000, in Times New Roman size 13-point font. According to MS Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, this reply brief contains 7,196 words; however, counsel is aware that MS Word did not count 33 words. Thus, this reply brief contains 7,229 **words**, which does not exceed 25% of 31,000 words (7,750) allowed for a reply brief.
- ✓ The floppy disks filed with this brief contains a copy of this brief. They have been scanned for viruses using a McAfee VirusScan program, which was updated May 5, 2002, According to that program, this disk is virus-free.
- ✓ A true and correct copy of the attached brief and a floppy disk containing a copy thereof were hand delivered, on the 6**th** day of May 2002, to the Office of the Attorney General, Supreme Court Building, Jefferson City, Missouri 65101.

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Gary E. Brotherton

Appendix

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